A history of Maine Department of Education Regulation 33
(February 1, 2011)

The Statute

March 18, 1997

The "Act to eliminate use of Time Out Box" was sponsored by Rep. Debra Plowman as a result of complaints from constituents in SAD 22 (Winterport) that the Smith School's use of a 3 ½ x 5 ½ box was cruel and traumatic. The legislation defined a "time out box" as a segregated area in which a student is placed for punishment or detention. The bill would have been enacted as 20-A § 11.

[Rep. Plowman noted in her testimony before the Education Committee that Maine was the 5th state in 1975 to outlaw corporal punishment in the schools.]

Plowman said: research showed that the correct duration of a time out (TO) is what works best but is usually 1 minute less than the child's age; TO spaces should be boring, but not scary; parents and students should discuss with the teacher the behavior involved and how to improve it; and a written plan of improvement by the student to change the behavior should be sought (where possible).

March 28, 1997

An amendment to the bill was proposed to have the department define and evaluate timeout intervention and its appropriate uses and to adopt rules by January 1, 1998, regarding the use of punishment techniques. It also proposed that DOE appropriate funds for training teachers in the use of intervention strategies for disciplinary measures.

April 1997

MADSEC opposed the bill saying "the use of various positive appropriate behavioral techniques should be described in the child's IEP."

According to OPLA's analysis of the pros and cons, the cons were against the bill for two basic reasons: Local control; and it was deemed overly broad.

May 1997

The Education Committee amended the bill by striking the title and the body of the bill and replaced it with a proposed change to 20-A § 4502 (5), that is, the addition of subsection M that now exists. That amended bill was enacted as 1997 P.L. Ch. 428. The law continues to exist today as it was enacted. In 1999, ", and" was added to the end of subsection 2 of subsection M but that addition was removed in 2001.

For the complete records of the Committee, see: Ed Comm. Records, 118-LD 1524. The LD with the House and Committee amendments is: Committee and House Amendments.

1997 PL. Ch.. 428

The bill as finally enacted, 1997 P.L. Ch. 428, contains the following features of interest:

1. A Mandate Preamble since the law required local government to expand or modify activities so as to necessitate additional expenditures from local revenue without funding at least 90 % of those expenditures, two-thirds of the House having determined that the law was necessary;

2. The PL also required that rules be adopted by January 1, 1998,
    a. in accordance with the standards established by DHHS for licensing residential child care facilities and DMHMRSAS for treatment,
    b. and stated that the rules were major substantive rules as defined by 5 § 375, subch. II-A;

3. The fiscal note to the bill said the only costs related "to the meetings to come up with alternative *discipline procedures*" and "additional cost associated with adopting rules related to *punishment techniques* can be absorbed by DOE." (Emphasis added.) (Evidently, TO at that time was considered a form of discipline.).

Items 1 and 2 are unallocated sections, meaning the sections are not found by searching the statutes, and have not been amended, meaning the sections have continuing effect to the extent the legislature so intended. While unallocated sections generally contain matters of temporary or short duration, that is not invariably so. On the question of whether the legislature intended these unallocated sections to effect only the initial rule promulgation, since unallocated sections typically have only a temporary or short term effect, or to have a continuing effect, the Department considers that a conservative view is preferred on that question, and accordingly regards these sections as having a continuing effect.

1999

1999 P.L. Ch. 669 (LD 1261) added: "; and" after (M) (2)

2001

2001 .PL. Ch. 452 (LD 1306) deleted: "; and" after (M) (2)

The Rule

Michael Opuda, Coordinator of the Due Process Office at the time of the initial rule development, now with the Drummond Woodsum law firm in Portland, said that he was approached by David Stockford to develop the rule sometime after the rule was supposed to have been adopted. He could not recall the reason for the delay in developing the rule. The records indicate that Michael began gathering and reviewing source materials in or about February 1998. He circulated within the department a rough first draft of the rule in March 1998.

The Basis Statement dated March 31, 2000, attached to both the provisional and the final rule, stated there were two stakeholder meetings in December 1999. Michael was the facilitator for the collaboration rulemaking process. The notice of the proposed rule was published December 23, 1999. A public hearing was held on January 21, 2000. The comment deadline was February 4, 2000.

Excerpts of some interest from the Comments to the proposed rule:

- The department "elected to maximize local control and flexibility" and for that reason:
    - Said that "local schools will need to define and clarify terms ("risk of harm," significant property damage," "dangerous behavior") within local policies;"
    - Said that schools need to decide whether the use of TO should be for emergencies, or for programmed use, or for both;
    - Did not require that comprehensive plans be developed with full parental support and using functional behavioral analysis and positive behavioral supports before programming the use of TO rooms;
    - Did not require that a student spend less time than 1 hour in TO;
    - Let local schools determine whether a training program meets the requirements of the rule;
    - Said that the use of TO and restraint was to be determined locally. For that reason, the department said no unfunded mandate was involved;
- The department made it plain that TO was limited to use in designated rooms so as to distinguish it from behavioral interventions such as being sent to the hallway;
- The department agreed at MADSEC's request to change "time out *room*" to "time out *area*" throughout the regulation;
- The department agreed at MSMA's request to revise the use of timeout rooms to include use for students who do not present a risk of harm but who "seriously disrupts the educational process." The department adopted this recommendation providing the timeout was not used for punitive purposes, staff convenience or minor misbehavior and only if less intrusive interventions failed;
- When MSMA asked the department to clarify the relationship between the statute (§ 4009) and the rule (regarding the use of restraint), the department replied that

the statute permits emergency intervention of a single adult until a second adult was able to intervene.

- The department agreed, on MSMA's request, to change the monthly review of the use of timeout rooms to quarterly. An emergency resolve of the legislature approved by the Governor on May 8, 2001, revised it further to make it an annual review. The emergency resolve also allowed documentation to be provided to administration within 2 days of the TO, and deleted from the definition of "aversive" the terms "loud noises" and "humiliating practices;"

The final rule was filed with the Office of the Secretary of State June 29, 2001, as Ch. 125.17D. Both the proposed and the final rule are identified as major substantive. The effective date of the rule was July 4, 2001 (This is based on the default rule which is 5 days after filing.)

Since the rule was thought too complicated for Ch. 125, it was deemed advisable to set it apart in its own chapter. Accordingly, a notice of rulemaking was filed on December 5, 2001. A final adoption of the Ch. 33 rule occurred without changing it as it appeared in Ch. 125 (based on facial appearances and without comparing the two rules section by section). The effective date of Ch. 33 was April 27, 2002, based on the prior practice of the Secretary of State's office of writing the effective date on the last page of the rule. (That date, however, differs from the default date - 5 days after filing (March 28, 2002) - and the proof date and website date (both April 23, 2002.) The Secretary of State's Office filed an approval on August 6, 2002.

No changes have been made in the rule since that time.

December 2009

Diane Smith of the Disability Rights Center offered a bill to amend 20-§ 4009 in an attempt to clarify the distinction between the type of restraint of concern to Ch. 33 and the type of constraint of concern to § 4009.

In the course of the discussions regarding the issues giving rise to the bill, the Department determined that there was need to review Ch. 33 to make it consistent with current understandings of best practices. The Department also determined that there was an immediate need to provide guidance on the dangers of some types of restraints. Administrative Letter No. 3 was disseminated in July 2009 to meet this need. One year later that guidance letter was amended by Administrative Letter No. 8 to clarify the involvement of the school nurse and to require a list be kept of all persons trained in the use of restraints.

In March 2010, MADSEC offered it's suggestions to revise the rule. Later in the year, the Department received the written suggestions of other commenters.

In July 2010, Department staff gathered to consider a protocol for complaints involving allegations of violations under Ch. 33, in light of the complaints in the spring

that had been reviewed by more than one office, and to renew its effort to review Ch. 33 to offer suggested revisions to the Commissioner by the end of the year. The Commissioner later formally designated the internal staff committee as the procedural means for work flow and accountability regarding the review of Chapter 33.

The internal committee recommended a number of stakeholders to the Commissioner who might wish to provide ideas on suggested changes to the rule. The stakeholders met on December 9, 2010. Several areas of concern were identified. The stakeholders also expressed their wish to participate with the Department in the rule development process.

The internal committee recommended to the Commissioner that consensus-based rule making (CBR) be used to develop the rule, and the Commissioner agreed to this process. The Department suggested that the number of participants be limited to 8-10 participants to represent all stakeholder interests in order to have the best work group possible for the most effective CBR process according to the prevailing literature. Since some stakeholders did not feel a limited representation would meet their needs to express their particular concerns, a second stakeholder meeting was held January 27, 2011, to see who among the stakeholders would commit to CBR in light of the commitment required for that process to be successful. A work group was formed by those who agreed to commit to the CBR process.